

1 UNITED STATES BANKRUPTCY COURT

2 SOUTHERN DISTRICT OF NEW YORK

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4 In re:

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6 LEHMAN BROTHERS HOLDINGS

7 INC.,

8 Case No. 08-13555(SCC)

9 Debtor.

10 - - - - - x

11 LEHMAN BROTHERS HOLDINGS

12 INC., IN ITS CAPACITY

13 AS PLAN ADMINISTRATOR,

14 Plaintiff,

15 v. Adv. Case No. 15-01110(SCC)

16 BANK FEDERAL HOME LOAN

17 BANK OF NEW YORK,

18

19 Defendant.

20 - - - - - x

21

22

23

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1 LEHMAN BROTHERS HOLDINGS

2 INC.,

3 Plaintiff,

4 v.

Adv. Case No. 14-02393(SCC)

5 LHM,

6

7 Defendant.

8 - - - - - x

9 LEHMAN BROTHERS HOLDINGS

10 INC., IN ITS CAPACITY

11 AS PLAN ADMINISTRATOR

12 Plaintiff,

13 v.

Adv. Case No. 15-01287(SCC)

14 COMMONWEALTH OF

15 MASSACHUSETTS,

16

17 Defendant.

18 - - - - - x

19 U.S. Bankruptcy Court

20 One Bowling Green

21 New York, New York

22

23 September 9, 2015

24 10:08 AM

25

1 B E F O R E :

2 HON SHELLEY C. CHAPMAN

3 U.S. BANKRUPTCY JUDGE

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6 Hearing re: 08-13555 - Doc #42105 Four Hundred Fifty-Fifth

7 Omnibus Objection to Claims (No Liability Claims)

8

9 Hearing re: Adv. 15-01110 - Doc #10 Motion to Dismiss

10 Adversary Proceedings

11

12 Hearing re: Adv. 15-01110 - Pre-trial Conference

13

14 Hearing re: adv. 14-02393 - Doc #37 Motion to Strike

15 Defendants Jury Demand

16

17 Hearing re: Adv. 15-01287 - Pre-trial Conference

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25 Transcribed by: Dawn South

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1 P R O C E E D I N G S

2 THE COURT: Good morning. Please have a seat.
3 How is everyone?

4 Good morning, Ms. Marcus.

5 MS. MARCUS: Good morning, Your Honor. Jacqueline
6 Marcus of Weil, Gotshal & Manges LLP on behalf of Lehman
7 Brothers Holdings Inc., as plan administrator.

8 Your Honor, we're here for the eighty-ninth
9 omnibus hearing. Originally it looked like the calendar
10 would be a very full calendar this morning, and we're
11 actually down to only one matter on the calendar, and that
12 matter is now uncontested. So this should be -- this part
13 of the hearing should be very quick.

14 THE COURT: Okay.

15 MS. MARCUS: The first item on the agenda is the
16 four hundred and fifty-fifth omnibus objection to claims,
17 it's ECF number 42105.

18 THE COURT: Right.

19 MS. MARCUS: It was listed as a contested matter
20 because in February of this year the claimants filed their
21 response to the objection, but late yesterday the claimants
22 withdrew their response, and that's at ECF number 50901.

23 In case the Court hasn't seen that withdrawal I
24 can hand a copy up.

25 THE COURT: We have. We have.

1 MS. MARCUS: Okay. So all of a sudden the claims
2 objection is now uncontested. If the Court would, like I
3 could go into the details, but I don't think that's
4 necessary.

5 THE COURT: I reviewed it in preparation for it
6 being contested, so I don't think -- the effect of the
7 withdrawal of the objection is that I'm simply going to
8 grant the trustee's motion -- sustain the trustee's
9 objection.

10 MS. MARCUS: Thank you, Your Honor. And our
11 apologizes for the fact we had to prepare for the hearing,
12 we were just getting no responses.

13 THE COURT: No problem.

14 MS. MARCUS: Switching to the adversary proceeding
15 docket, the next matter is Lehman Brothers Holdings Inc.
16 versus Federal Home Loan Bank of New York.

17 THE COURT: Right.

18 MS. MARCUS: My partner, Ralph Miller, will be
19 handling this on behalf of the plan administrator, and
20 Mitchell Berns of Fox Rothschild, is here on behalf of HLB.

21 THE COURT: Okay.

22 MS. MARCUS: I believe we're going to start with
23 the motion to dismiss, so I'll turn the podium over to
24 Mr. Berns.

25 THE COURT: Okay. Thank you very much.

1 Good morning. How are you?

2 MR. BERNs: Good morning, Your Honor. Mitchell
3 Berns of Fox Rothschild for the Federal Home Loan Bank of
4 New York.

5 I understand you'd like to handle the motion first
6 and then we do the conference on the schedule.

7 THE COURT: Yes, I think so.

8 MR. BERNs: Yes. Yes, Your Honor.

9 Your Honor, I'll be brief. I think the positions
10 are pretty well laid out in the papers.

11 THE COURT: They are.

12 MR. BERNs: Yeah.

13 THE COURT: But let me start with one aspect of it
14 that -- and I really want to try to avoid too much getting
15 into the merits and characterizing the merits, because we're
16 obviously only at the beginning, but with respect to the
17 equitable subordination count you basically say two things.
18 Look, this doesn't amount to more than a hill of beans and
19 you go through some math, but in the same breath you say
20 this really can't be determined on a motion to dismiss.

21 So, I think first choice is I would find that this
22 is going to be de minimis no matter what and I should kick
23 it out, but you do admit that it's not something that would
24 typically be resolved on a motion to dismiss.

25 MR. BERNs: I'd say both statements you made are

1 right and consistent. It is a hill of beans that can only
2 benefit lawyers and not creditors.

3 THE COURT: Well but I -- see, I don't even think
4 -- I don't know that that's true, because I don't think that
5 when I look forward in the sense of looking ahead as opposed
6 to happily anticipating something, when I look forward to
7 this case being tried I don't know that the proof is going
8 to be any different or that anything is going to be any
9 different if the equitable subordination claim remains just
10 sitting out there.

11 MR. BERNS: To the -- yes, in this sense. The
12 contract provision at issue here contains an expressed good
13 faith requirement.

14 THE COURT: That's the -- that's next. That's the
15 point that I'm going to give Mr. Miller a hard time about.

16 MR. BERNS: It does play though into the equitable
17 subordination issue.

18 Absolutely correct, Your Honor cannot make a
19 judgment about whether our conduct was equitable or not at
20 this stage, ridiculous, you can't do it.

21 What you can say is that leaving that claim in
22 there can just cause cost and mischief. Anything that
23 Mr. Miller wants to test regarding the good faith of the
24 bank in calculating the termination value of these swaps is
25 going to --

1 THE COURT: Look, but don't you think --

2 MR. BERNES: -- stay in the case any way.

3 THE COURT: But don't you think I would, you know,
4 appropriately reign him in? I mean I -- look --

5 MR. BERNES: We have faith that you will do so.

6 THE COURT: Okay. The issue that I have, again,
7 without getting into the merits and without characterizing,
8 because it's so preliminary, I'm interested in what occurred
9 here.

10 MR. BERNES: Uh-huh.

11 THE COURT: Okay? I'm interested in the fact that
12 there appears to be a, you know, these 44 replacements that
13 were reported as one thing and then later turned out to be
14 another thing. Okay? Subject to your rights to put on
15 whatever case you will put on that's a fact that concerns
16 me.

17 So --

18 MR. BERNES: Uh-huh.

19 THE COURT: -- my view is the pleading -- the
20 equitable subordination count, and I'm not at the good faith
21 and fair dealing yet, it stays out there because I want to
22 see what happens. I want to see what happens. It seems to
23 me that if Lehman proves what they've alleged frankly there
24 ought to be a consequence.

25 MR. BERNES: Uh-huh.

1 THE COURT: And I know the law very well about
2 equitable subordination.

3 MR. BERNS: Yes, right.

4 THE COURT: And I know the law is that it's only
5 to the extent of harm, but it's a biggie for me that people
6 deal honestly when they're dealing in the bankruptcy court
7 and in connection with a Chapter 11 case, so, I think it
8 stays out there.

9 MR. BERNS: Yeah, I think the discovery will be
10 the same in any event, Your Honor.

11 THE COURT: Good. Okay. That's what I think.

12 MR. BERNS: Okay.

13 THE COURT: So is there anything that you want to
14 say about the breach of the implied covenant of good faith
15 and fair dealing?

16 MR. BERNS: Yeah. Very briefly again, Your Honor.

17 The difference between this case and the cases
18 you've written on and talked about, the Wellmont and
19 LightSquared case, is that Mr. Miller's claim depends here
20 on a contract with an expressed good faith requirement.
21 It's already in the contract claim. There's nothing to be
22 added by implying another covenant.

23 I understand --

24 THE COURT: But the calculation --

25 MR. BERNS: Yes.

1 THE COURT: -- I mean there's a number of
2 provisions of the ISDA that come into play here. Where the
3 good faith words certainly live are the calculation of loss
4 must be done reasonably and in good faith.

5 MR. BERNS: Yes. Yes.

6 THE COURT: Okay? So there does seem to be a
7 scenario in which the calculation could have been done
8 reasonably and in good faith, but other things were not.

9 MR. BERNS: Every --

10 THE COURT: Okay.

11 MR. BERNS: I'm sorry, Your Honor.

12 THE COURT: Go ahead.

13 MR. BERNS: Everything that has been alleged in
14 this complaint concerns the calculation of the damages.
15 It's all wrapped up in that loss definition with that broad
16 discretionary clause saying, you must calculate your gain on
17 termination. Here we had a gain, so --

18 THE COURT: Right.

19 MR. BERNS: -- (indiscernible). It all depends on
20 whether or not we calculated our gain on termination in good
21 faith.

22 THE COURT: Including when you calculated it?

23 MR. BERNS: Yes. Yes, Your Honor. That's all
24 part of that clause. We calculated that claim. I don't see
25 anything in the complaint that is contesting the date of our

1 calculation. We calculated in November of 2008. This was
2 not a greatly delayed exercise. We terminated the swaps on
3 the 18th of September.

4 THE COURT: Right.

5 MR. BERNS: We replaced most of the value within
6 two trading days. And we finished up our calculation and
7 gave them a calculation statement at the end of November.

8 So this was not -- you know, this was not a drawn
9 out process.

10 THE COURT: But that calculation statement
11 included the incorrect information about the existence of
12 the replacement swaps.

13 MR. BERNS: I wouldn't characterize it's
14 incorrect, Your Honor, the bank made a decision to treat all
15 swaps, not replace as of the end of its calendar quarter,
16 which was September 30, as on replaced swaps. It made a --
17 it was an accounting-based decision to do that.

18 THE COURT: So -- okay.

19 MR. BERNS: And that will be contested.

20 THE COURT: Right.

21 MR. BERNS: Yes.

22 THE COURT: So if the ISDA --

23 MR. BERNS: Uh-huh.

24 THE COURT: -- permitted that --

25 MR. BERNS: Yes.

1 THE COURT: -- right, then I think what Mr. Miller
2 is trying to say is that even if the ISDA permitted that
3 that's where the breach of the implied covenant of good
4 faith and fair dealing comes in, because you're now in
5 LightSquared world technical compliance but oh, come on, it
6 can't possibly be okay that the next day -- I'm exaggerating
7 -- you then go out and replace the positions and you don't
8 tell anyone for four, five, six years.

9 MR. BERNS: I think that is Mr. Miller's position,
10 and our position -- if he's correct that we were playing a
11 game with that calculation, that we were hiding, that there
12 was these 44 swaps that we decided later to replace, if he's
13 correct about that our position is simple, it wouldn't pass
14 muster under the ISDA as written, it wouldn't be in good
15 faith -- it wouldn't be a good faith calculation. If we are
16 gaming, cherry picking, if we did -- if he establishes that
17 we did that --

18 THE COURT: Uh-huh.

19 MR. BERNS: -- our position is there's one good
20 faith concept, it's already in this contract, you don't need
21 to imply another one.

22 We can't be gaming that calculation and satisfy
23 the requirement -- basic requirement of the loss provision
24 that our calculation of our gain be done in good faith and
25 reasonably. So it's already there. That's why this is an

1 easy case.

2 THE COURT: All right.

3 MR. BERNS: Thank you, Your Honor.

4 THE COURT: Let me talk to Mr. Miller, please.

5 How are you, Mr. Miller?

6 MR. MILLER: Good morning. I'm fine, Your Honor.

7 I hope you're well.

8 THE COURT: So the question -- I think the most
9 succinct way to state the question is whether or not there's
10 a complete overlap between the good faith requirement in
11 loss, quote/unquote, as used in the ISDA, or elsewhere in
12 the ISDA and the implied covenant of good faith and fair
13 dealing. Because if there's nothing -- you know, if it's a
14 been diagram and they're total a coincident then Mr. Berns I
15 think is right.

16 MR. MILLER: Your Honor, may I approach?

17 THE COURT: Sure.

18 MR. MILLER: I have two --

19 THE COURT: Thank you.

20 MR. MILLER: Your Honor, I have two pages from the
21 pleading that I think deal precisely with that issue, which
22 I anticipated you were going to ask me.

23 The first chart that I passed out just from the
24 complaint illustrates the facts that are necessary for Count
25 I, the breach of contract count and also Count III, which is

1 a violation of Section 562. Those have to do with when and
2 what the value of the swaps are, the negotiable instrument
3 that is essentially the swap. Actually it's 356 swaps, but
4 they're all very similar. They are interest rate swaps and
5 they're one product essentially, and they're all terminated
6 on the date marked here, September the 18th, and the bank's
7 theory, as the Court has correctly noted, is that
8 replacement value on any date controls, that they can
9 stretch out a series of replacements at their discretion and
10 essentially pick valuation dates on subparts of the swaps
11 and then those would come retroactively applicable.

12 What they filed looked to be consistent with their
13 calculation statement, which had a table at the back, it's
14 described in the complaint so you take it as true, it said
15 unreplaced swaps, that this was all the replacements there
16 were. In fact the replacements out here are off this chart
17 that were concealed by the calculation statement, and after
18 those replacements were made the calculation statement was
19 sent, and after those replacements were made two claims for
20 about \$65 million were filed because these numbers are --
21 some of these numbers are below the 500 million roughly
22 collateral level. So if in fact the value had been down
23 here some of the collateral would have come back to them.
24 If the value is up here there's \$150 million before interest
25 of additional collateral that should have been posted and

1 should be posted when they exercise their absolute
2 discretion. In the Shield case you've noted they had
3 absolute discretion.

4 That's essentially the factual situation for
5 Count I.

6 The unreplaced swaps are invisible from the
7 standpoint of what they produce, half a decade passes,
8 Mr. Berns takes over as new counsel, and I want to
9 compliment him, he say, wait a minute, we need to rethink
10 this, because they've got a claim sitting out there that
11 says they're unreplaced swaps when they were in fact
12 replaced.

13 And it's very important to understand that the way
14 that they were replaced and the way they were handled
15 undermines their basic legal theory on valuation, and here's
16 the reason it does.

17 First in fact you can just continue to scatter
18 replacements all out this doctrine makes no sense, it's
19 unworkable, these negotiable instruments. So the fact that
20 they did them, they hid them because they really couldn't
21 extend it that far, they just sort of thought they could
22 stretch it it appears to the end of September.

23 So concealing that fact, which is not something
24 that the ISDA says you do not do, you do not conceal facts
25 about your own conduct, because normally the ISDA does not

1 have anything to do with the conduct of the non-defaulting
2 party. Normally the ISDA is an objective replacement based
3 on what was the market on that date. That's the only way
4 the other party can check it and figure out what to do with
5 it.

6 They have injected the novel theory our conduct
7 changes this calculation, and then they --

8 THE COURT: But right there is where I say, right,
9 and that conduct as described by you is not in good faith.

10 MR. MILLER: That's correct, Your Honor, that's my
11 point.

12 THE COURT: So therefore they violate the ISDA in
13 that their calculation is not in good faith and made
14 reasonably and in good faith.

15 MR. MILLER: Your Honor, let me suggest if you go
16 back with the chart that we have --

17 THE COURT: Right.

18 MR. MILLER: -- makes it clear that these things
19 had several consequences.

20 The 285 swaps they did replace, these are
21 basically the dots of the chart, and they said they
22 replaced, and that literally hasn't changed. But then we
23 got to 71 swaps, and you've already noted 44 of them they
24 said were unreplaced and were replaced. They filed a
25 bankruptcy claim. The ISDA says nothing about filing

1 bankruptcy claims. The ISDA says nothing about taking a
2 claim for \$45 million and inflating it to about \$65 million
3 and leaving it on the docket for 5 years. That conduct
4 caused costs to the estate, that conduct caused disruption,
5 that conduct had implications for settlement discussions,
6 there were two mediations in this case, that conduct is not
7 covered by the commercially reasonable --

8 THE COURT: By the ISDA.

9 MR. MILLER: -- by the ISDA -- no, it doesn't say
10 anything about bankruptcy claims, it doesn't say anything
11 about misrepresenting.

12 This is exactly the kind of forging of
13 implementation of the ISDA contract that you talked about in
14 LightSquared and it came up in Wellmont. They had
15 additional conduct, and our view is that this additional
16 conduct produces additional damages.

17 Let's assume, as we think is correct, that they
18 should valued on the 18th their whole theory is no good.
19 Okay. All that produces is a correct value on interest.
20 But on top of that they misrepresented their own conduct and
21 they interposed two claims, one against LBHI and one against
22 LBSF, that were inflated by 44 percent.

23 What if all the claimants in this case inflated
24 their claims by 44 percent based on misrepresentation facts?
25 What does that do to the administration and estate?

1 There ought to be additional damages, and as the
2 Court noted in LightSquared, some of the additional damages
3 might include additional administrative expenses, interest
4 in dividends lost by creditors during the delay,
5 professional fees and expenses incurred. Those would be on
6 top of the 150 million plus interest that should be
7 recovered, and they never get to equitable subordination
8 because they have no claim.

9 That's what the good faith and fair dealing
10 complaint is for, is for the additional damage of sticking
11 two claims out there and not correcting the calculation
12 statement. The calculation statement is actually only one
13 subpart. So that's what we believe the additional conduct
14 is.

15 It is only a motion to dismiss, it should be
16 preserved, and we ask that the Court deny the partial motion
17 to dismiss, Your Honor.

18 THE COURT: All right. Thank you, Mr. Miller.

19 MR. BERNS: Just very briefly?

20 THE COURT: Yes.

21 MR. BERNS: I'm not sure I understand Mr. Miller's
22 point about additional damages. What he's -- I understood
23 him to be arguing about the implied covenant claim. It's
24 either -- that's a breach of contract claim. It's an
25 implied covenant, but either he's got contract damages or he

1 doesn't. Whatever contract damages he can recover for a
2 breach of the implied covenant he can also recover for
3 breach of good faith under the contract. So, I don't --
4 it's still complete duplication.

5 THE COURT: I don't think there is, because what
6 he's focusing on is the filing of the bankruptcy claim. The
7 filing of the bankruptcy claim, which is not governed by the
8 ISDA, and the entire course of conduct related to the filing
9 of the bankruptcy claim is outside of the ISDA regime.

10 And I said it when you rose earlier, and subject
11 to your rights to be heard and to defend the allegations,
12 it's a troubling set of facts on its face.

13 Mr. Miller articulated exactly what I had been
14 thinking about, which is this wouldn't be a good thing if
15 people routinely did it. Now it's not a -- it's not
16 breaking news that people submit over-inflated claims in a
17 bankruptcy case. They do that, I've heard. On the advice
18 of lawyers, on the advice of advisors, they know they're
19 only going to get paid cents on the dollar, it's a
20 litigation position, et cetera.

21 What has been alleged here, at least preliminarily
22 arguably, is in a different category. I don't know.

23 But it strikes me again that at this very
24 preliminary stage, and because it's not going to change one
25 iota how the parties prepare for trial, I think it ought to

1 stay in, because it strikes me that something happened, we
2 need to get to the bottom of it, and that if in fact it
3 happened the way Mr. Miller says it did and you don't
4 provide a explanation that makes it seem better there ought
5 to be a consequence. And whether the consequence frankly
6 is, you know, a couple of \$10,000 of administrative expense
7 or whatever, there ought to be a consequence --

8 MR. BERNS: Uh-huh.

9 THE COURT: -- that this is about adjudicating
10 this dispute, but this also implicates, at this stage, the
11 appropriate administration of the bankruptcy system in a
12 bankruptcy case of this magnitude.

13 So, I think the motion to dismiss is going to be
14 denied.

15 MR. BERNS: Uh-huh.

16 THE COURT: It is going to be denied, and I think
17 we ought to talk about the discovery schedule --

18 MR. BERNS: Okay.

19 THE COURT: -- going forward. And on that if we
20 could, Mr. Miller, if we could segway into the discovery
21 schedule. On that one --

22 MR. BERNS: Would you like me here?

23 THE COURT: You can go back to the table.

24 MR. BERNS: Yeah.

25 THE COURT: On that one -- you know, I love charts

1 because charts are always delightfully cherry picked, okay,
2 they're just -- you know, you find two of the most difficult
3 cases and you say, look how much time they have, and then
4 you say, you know, there's not enough time here, but I'm
5 really -- this is a real head-scratcher to me, because
6 there's -- you're not that far apart.

7 So the only point, Mr. Miller, that you make is
8 look, discovery -- pretrial schedules only get longer, they
9 don't get shorter, but at the outset you're only apart by
10 two months.

11 MR. BERNS: Five months, Your Honor.

12 THE COURT: No -- well, I mean for the first
13 phase.

14 MR. BERNS: For the first phase, yes.

15 THE COURT: For document production. So, you
16 know, I'm just not smart enough to know what difference the
17 two months makes.

18 MR. BERNS: Your Honor, it's based on our estimate
19 of how long it's going to take. The primarily gating issue
20 here is there's lots of transcripts, some of which aren't in
21 good shape. I'm talking about all the transcripts that need
22 transcription and review and all that, it's a lot more --

23 THE COURT: Do you have an agreement about there
24 being a rolling production or is this --

25 MR. BERNS: Yes, we'll start producing whenever.

1 Whenever we have stuff we'll start producing. We just have
2 a good sense -- but the burden of production here, Your
3 Honor, is I would say a large measure of it's going to fall
4 on us, because the key issues in contention are just what we
5 did in replacing these swaps and how we acted.

6 THE COURT: Right.

7 MR. BERNES: So we've made an estimate, but we do
8 have some issues just in terms of personnel transition, and
9 we think that we'd rather start with something reasonable
10 than have to come back for these incremental increases all
11 the time.

12 We are -- I should say that we've made this point
13 to Mr. Miller, our client here is also very concerned about
14 the time here. Remember there's an interest claim here and
15 that affects us as well. So we plan -- we're pursuing this
16 case pretty expeditiously. We started discovery before
17 we've even closed the pleadings, and we see those as
18 unrelated in a sense.

19 So we're going pursue this expeditiously, but we
20 think what we propose is quite reasonable and we'd rather
21 just not have to come back for a bunch of extensions.

22 THE COURT: The next issue is why -- is this --
23 the fact depositions --

24 MR. BERNES: Correct.

25 THE COURT: -- is that time to complete?

1 MR. BERNES: That -- yeah, that's the deposition
2 period potentially start earlier than the end of document
3 production, but we thought that especially given the way
4 this five months lays out, it just lays out over the
5 summertime, so if we are finishing our document production
6 in April then we'd be doing depositions through I think
7 early September, and it seemed that especially -- I think
8 there's going to be -- there are a number of people at the
9 bank what are involved in this and I suspect Mr.
10 (Indiscernible) would want to go talk to them --

11 THE COURT: I would suspect so.

12 MR. BERNES: -- and we thought that it -- actually
13 and I'm going to want to be involved in those depositions,
14 and it's going to take some time, and there's probably going
15 to be some third-party deps as well. I have traders here, I
16 think Mr. Miller is going to be contesting some of our
17 replacement pricing, whether we acted reasonably, whether we
18 set the right bids, there are other trade -- God knows what
19 they're going to remember five years later, but my guess is
20 they're going to be deposed. And so --

21 THE COURT: So let me ask you, do either of you
22 think realistically that this is going to be amenable to
23 summary judgment?

24 MR. BERNES: I think issues will be amenable to
25 summary judgment. Mr. Miller, one of his main contentions

1 is the applicability of Section 562 here and what it means
2 if it's applicable. Does it change the ISDA? I think that
3 issue, if the Court has informed views on it will be whether
4 or not it disposes of the whole case or not, it'll narrow
5 the issues for either trial or discussion.

6 So, I think summary judgment motions here will be
7 very useful one way or another.

8 THE COURT: Mr. Miller?

9 MR. MILLER: Yes, Your Honor. First of all --

10 THE COURT: I mean I hate to just start, you know,
11 to split things down the middle.

12 MR. MILLER: Right. Okay. Well, Your Honor, let
13 me say first of all that our position is we offered to let
14 them sort of distribute the time any way they wanted to
15 throughout. We just felt that they originally asked for
16 seven months longer than we thought it ought to be, we
17 agreed to give two months, or maybe it was more and they
18 moved back, but we're still five months apart.

19 And the real problem with this is that the way
20 it's set up now the summary judgments we propose should be
21 able to be submitted even the winter of 2016, which would
22 open the way to a trial in early 2017.

23 THE COURT: So why can't we get back those two
24 months by having the summary judgment exercise occur earlier
25 or coterminous with, for example, expert reports and expert

1 depositions? Because it won't have anything to do with that
2 will it?

3 MR. MILLER: Well, Your Honor, I agree that a
4 partial summary judgment on this critical issue of what is
5 the operative date does not depend on what the experts say.

6 THE COURT: Right. I mean that's an issue of law,
7 that's -- right?

8 MR. MILLER: A complete summary judgment on what
9 is the damage on that date is going to have expert
10 differentials, and you know, that's -- I don't think the
11 whole case --

12 THE COURT: Right, but that's not going to be
13 summary judgment --

14 MR. MILLER: That's right.

15 THE COURT: -- because you're going to have
16 different experts, so.

17 MR. MILLER: That's right, Your Honor. So --

18 MR. BERNS: Yeah, I can't anticipate all the
19 experts -- all the expert testimony yet, but I think
20 stacking summary judgment motions into the expert discovery
21 period is going to turn out to be a result in us coming back
22 in to -- it's not going to really work, Your Honor.

23 THE COURT: I don't really understand that,
24 because a summary judgment is going to be asking me to make
25 a legal -- you just said it's a legal determination on a

1 purely legal issue, it's got nothing to do with -- it is
2 conceivable that it has nothing whatsoever to do with
3 experts. If you've got competing expert reports I don't
4 want to see a summary judgment motion.

5 MR. BERNS: Right.

6 THE COURT: That's not a summary judgment motion.
7 It's just not. A summary judgment motion is a purely legal
8 issue, no undisputed facts. You know, I'm not going to do
9 death by a thousand cuts.

10 So, I know you have your rights under the federal
11 rules to file summary judgments, but it just strikes me that
12 that's one area that you're going to both have teams working
13 on this, and I can understand how you're going to want to be
14 in multiple depositions, but other folks can be working on a
15 summary judgment motion way, way earlier. I mean that's one
16 place to pick up a couple of months.

17 MR. BERNS: Yeah, Your Honor.

18 MR. MILLER: And it's helpful, Your Honor.

19 THE COURT: So, I mean, you know, put that -- back
20 that up into, I don't really care, you know, somewhere in
21 expert territory.

22 MR. MILLER: That would certainly be acceptable to
23 us, Your Honor.

24 Our goal is to try to get this so that it becomes
25 possible to have this tried in early 2017 instead of out to

1 the end of 2017. If we could get a trial setting by the way
2 that would be really helpful for all of us because we'd work
3 toward it, if the Court has any amenability to giving --

4 THE COURT: I am absolutely amenable to giving you
5 a trial date.

6 MR. MILLER: Okay.

7 THE COURT: Absolutely. It's helpful to me in
8 many regards as well.

9 So if you move the summary judgment exercise back
10 up so that's coincident with some aspect of the expert
11 reports, and the beauty of that is that also affords me time
12 to actually consider it and rule on it prior to when you're
13 going to go to trial. So then if we in a very highly
14 complex and scientific fashion split the baby on document
15 production and call it ten months you've just gotten back
16 another month, so you've gotten back three months, and that
17 three of the five probably is a good result.

18 MR. MILLER: It is, Your Honor. We do have a --
19 we have a draft --

20 THE COURT: Ten -- where does the ten months -- I
21 see agita on your face. Where does the ten months put you
22 in terms of life? You know, the summer, or Christmas? I
23 think to be sensitive to those issues.

24 MR. BERNS: Your Honor, one of our in terms of
25 life --

1 THE COURT: I mean as my husband likes to quote
2 from the Godfather, this is the business you chose, so.

3 MR. BERNS: And this is the business we choose.
4 There is one business that we can't control the founder of,
5 and my document manager is sitting next to me, and he's
6 going to be out for several months, and so that is part of
7 our consideration. We are making arrangements to cover, but
8 it is going to extent the documents to such a time.

9 I still think realistically that the calendar is
10 the calendar, and whatever you determine we're going to hit,
11 but we'll probably be coming back to you if we press the
12 document production schedule with, you know, bits and pieces
13 and things that have to be done.

14 THE COURT: Well again, I -- you know, life does
15 what it does and I appreciate that, but one of the benefits
16 of having large, extremely capable firms is that you figure
17 those things out.

18 MR. MILLER: Yes, Your Honor.

19 MR. BERNS: Yes, Your Honor.

20 THE COURT: So, I'm going to say ten months on the
21 document production.

22 MR. BERNS: Uh-huh.

23 THE COURT: I'm sensitive to your representation
24 about your own involvement in fact depositions. I don't
25 think I'm going to change that at all. That moves you back

1 up three months.

2 So, Mr. Miller, where does that put the end point
3 at in terms of a trial date?

4 MR. MILLER: Well, You Honor, I guess the question
5 is how long do you want to have with the summary judgment
6 motions? The -- if we can move the --

7 THE COURT: So if the summary judgment motions are
8 -- the expert reports come in on your calendar in October of
9 2016.

10 MR. MILLER: Yes.

11 THE COURT: Right?

12 MR. MILLER: Right.

13 THE COURT: So there's an enormous amount of time
14 between the expert reports and the expert depositions. So
15 on my theory of the lack of relationship between them to me
16 there's no reason why the summary judgment motions couldn't
17 come in, for example, on February 1st.

18 MR. MILLER: Of 2017?

19 THE COURT: Of 2017.

20 MR. MILLER: Yes. Well --

21 THE COURT: Right. And then I could give you a
22 trial date of --

23 MR. MILLER: April 9th?

24 THE COURT: -- of April 1st. I was going say end
25 of March, but that tends to be a spring break time for some

1 people. So first week of April 2017, how's that?

2 MR. MILLER: Your Honor, let me look back and find
3 -- I mean we obviously would like it sooner, but if we can
4 get it then we'd love to knock it down and move forward with
5 that, and we certainly -- we're not -- we don't think
6 there's necessarily going to be nearly as many depositions
7 as Mr. Berns has suggested. For one thing they're very
8 expensive, and for another thing our central position here
9 is --

10 THE COURT: See under --

11 MR. MILLER: -- that the conduct of the bank is
12 not relevant.

13 THE COURT: -- under the existing schedule the
14 summary judgment motion is not coming until May 1st --

15 MR. BERNS: Uh-huh.

16 THE COURT: -- then you're not going to have a
17 trial 'til the fall.

18 MR. BERNS: Uh-huh.

19 MR. MILLER: That was our central concern, Your
20 Honor, with this.

21 THE COURT: And --

22 MR. MILLER: And your adjustment makes it possible
23 for us to have this trial. We very much wanted it before
24 the summer of 2017.

25 If this gets moved off another six months the

1 estate has to maintain personnel to deal with this, the
2 estate is shrinking at this point.

3 THE COURT: Well let me take it from -- Mr. Berns,
4 what about this is not workable for you?

5 MR. BERNS: I guess what I'm troubled with --
6 troubled about, Your Honor, is that Lehman has asserted a
7 \$150 million claim against us.

8 THE COURT: Right.

9 MR. BERNS: The spread between where we are and
10 where they are is \$200 million.

11 THE COURT: Okay.

12 MR. BERNS: This case was mediated in 2011, and
13 then nothing happened for three years until we got a request
14 for a tolling agreement because they weren't ready to do
15 anything. By that time the statute of limitations --

16 THE COURT: Okay. Now we're --

17 MR. BERNS: And we said, fine --

18 THE COURT: But you see, now --

19 MR. BERNS: -- now we're rushing --

20 THE COURT: But now --

21 MR. BERNS: -- now we're rushing. I don't
22 understand why we're rushing.

23 THE COURT: I don't think that we're rushing it, I
24 think that we're proceeding expeditiously, and against the
25 backdrop of, you know, what seems to have occurred here,

1 everybody ought to be excited about getting this done. I
2 think the time frames are aggressive, but not unachievable.
3 And again, it's a \$200 million case, and therefore it I'm
4 sure will be appropriately staffed, and for goodness sake
5 we're talking about April of 2017, that's a really long way
6 away.

7 MR. BERNES: Two years from when the claim filed.
8 Two years. A case like this would normally be three or
9 four, maybe --

10 THE COURT: Not before me. Not here. Not here.

11 MR. BERNES: But it's -- there is a lot of work to
12 be done here. We're going to do whatever Your Honor feels
13 is --

14 THE COURT: Love it.

15 THE COURT: -- proper.

16 THE COURT: I tried LightSquared four times in a
17 year and a half, so I know that you can do it. If you hit a
18 bump in the road of course I'd be willing to hearing about
19 it, but I think this tweaking of the schedule is reasonable
20 and achievable.

21 MR. MILLER: Thank you.

22 THE COURT: All right?

23 MR. MILLER: Do you want us to revise the order
24 and submit it to the Court?

25 THE COURT: I think that would be --

1 MR. BERNS: We'll work on that. We'll work that
2 out.

3 THE COURT: That would be useful.

4 MR. MILLER: Right. I did want to note, Your
5 Honor, we very appreciate that and we agree with everything
6 you've said, but with interest it's actually more like a
7 \$300 million case than a \$200 million case, because the
8 interest will --

9 THE COURT: Well now you're making more of his
10 point, so I don't know, Mr. Miller, perhaps you should stop
11 talking.

12 MR. MILLER: Thank you, Your Honor, for your time.

13 THE COURT: All right. Thank you very much.

14 MR. BERNS: Thank you, Your Honor.

15 THE COURT: All right.

16 MS. MARCUS: Your Honor, the next matter on the
17 agenda is also the adversary proceeding docket and it's the
18 LHM matter. That's going to be handled by Mr. Bialek from
19 Wollmuth.

20 THE COURT: Okay.

21 MS. MARCUS: May we be excused, Your Honor?

22 THE COURT: Yes. Thank you, Ms. Marcus.

23 MS. MARCUS: Thank you.

24 (Pause)

25 THE COURT: I'd like to take a brief break and

1 confer with the parties on this matter in chambers. All
2 right? If you would join me in that conference room back
3 there I would appreciate it. We'll come back on the record
4 very shortly.

5 (Recessed at 10:46 a.m.; reconvened at 11:04 a.m.)

6 THE COURT: We're going to go back on the record
7 with respect to the -- Lehman's motion to strike defendant's
8 jury demand. I think, folks that you're positions are very
9 well laid out in the papers, and I don't think I'm going ask
10 for any further oral argument this morning, so we're going
11 take this under submission and we'll get back to you in due
12 course. All right? But I appreciate your coming out for
13 the hearing.

14 (A chorus of thank you)

15 THE COURT: All right. Thank you.

16 All right. Next. Where's my agenda? I got it.

17 MR. TAMBE: Good morning, Your Honor.

18 THE COURT: Good morning, Mr. Tambe. How are you?

19 MR. TAMBE: Fine. Thank you. This is Lehman
20 Brothers adversary proceeding against Commonwealth of
21 Massachusetts, it's a pretrial conference. My colleague,
22 Ryan Andreoli, will be addressing this matter.

23 THE COURT: Okay. Very good.

24 MR. ANDREOLI: Good morning, Your Honor.

25 THE COURT: Good morning.

1 MR. ANDREOLI: Ryan Andreoli from Jones Day on
2 behalf of the plaintiffs, LBHI and LBSF.

3 So this is our first time before the Court on this
4 adversary proceeding, so we just wanted to give Your Honor
5 about a minute or so of background --

6 THE COURT: That would be great.

7 MR. ANDREOLI: -- and then discuss the scheduling
8 issue that we may seek the Court's guidance on --

9 THE COURT: Okay.

10 MR. ANDREOLI: -- in the next week or so.

11 So this is a fairly standard valuation dispute.
12 Two ISDA master agreements, six interest rate swaps in
13 total. The Commonwealth terminated the transactions on two
14 different occasions. The first was about five different
15 swaps in October of 2008, and then the last swap in November
16 of 2008. They hired a financial advisor to assist them with
17 that process. And ultimately entered into replacement swaps
18 for all of the six swaps at issue. They received
19 approximately \$9 million more in replacement swaps than they
20 have paid Lehman to date. So that's sort of the basis of
21 our claims.

22 We have not yet agreed on a scheduling order. As
23 you may have seen from the docket we filed our complaint at
24 the end of July, the Commonwealth filed their answer I guess
25 it was a week or two ago. The -- we proposed a draft

1 scheduling order at the beginning of last week. We've been
2 informed that the Commonwealth's client is away on vacation
3 or perhaps just out of the office for the next two weeks.
4 So we have proposed to discuss the scheduling order to try
5 to reach an agreement next week when they return.

6 THE COURT: Okay.

7 MR. ANDREOLI: We've been informed that the
8 Commonwealth, at least counsel, thinks that they may need,
9 you know, a couple of weeks to negotiate the scheduling
10 order, which seems like a little unreasonable to us.

11 So we would propose that if we don't reach an
12 agreement next week we submit a letter to Your Honor to try
13 to resolve the dispute.

14 And just to sort of lay out our proposal. We
15 think that this matter can be through discovery -- document
16 discovery by the middle of December, fact discovery
17 concluding by the end of January, expert discovery by the
18 end of March, and then dispositive motions, if any, by the
19 end of May.

20 The Commonwealth, while they don't have authority
21 to negotiate until their client returns, they've proposed
22 something substantially lengthier beginning with not even
23 serving initial document requests interrogatories until mid
24 November, which seems like an extraordinary length of time
25 to serve document requests. Their proposal continues

1 through the end of document production in February, fact
2 depositions end of June, expert reports in July, and
3 dispositive motions approximately 14 or 15 months from now
4 in November of 2016.

5 So we don't have a dispute yet, but just wanted to
6 let the Court know that we may be sending a letter to Your
7 Honor as early as next week.

8 THE COURT: Okay. Thank you.

9 MR. ANDREOLI: Thanks very much.

10 THE COURT: Good morning.

11 MS. WALSH: Good morning, Your Honor. Kaitlin
12 Walsh from Mintz Levin for the Commonwealth.

13 What Mr. Andreoli said was true, my client is out,
14 we got the draft discovery plan on September 1st, and
15 unfortunately she's out from the 3rd through the 14th. Her
16 first day back is the 14th.

17 So what we were hoping was that we would have next
18 week to work with her in coming up with a consensual plan.
19 We're optimistic that we can do that. I don't think
20 we're --

21 THE COURT: But she's --

22 MS. WALSH: So she's back --

23 THE COURT: So she's back on Monday.

24 MS. WALSH: -- on the 14th, yeah.

25 THE COURT: Okay.

1 MS. WALSH: On Monday.

2 THE COURT: Okay.

3 MS. WALSH: And our concern was two days when
4 she's back from being out for ten days I guess for us to be
5 able to get her focused and get the -- her approval in two
6 days is a little tight.

7 So all we were asking was that we have until the
8 next week, the following week, to come up with the plan,
9 we're thinking like the end of that week, if possible, so
10 that we can --

11 THE COURT: Do you mean 'til the 25th?

12 MS. WALSH: Yeah. Or some time --

13 THE COURT: Let me just -- let's do a level set
14 here.

15 MS. WALSH: Uh-huh.

16 THE COURT: These times -- I mean I appreciate
17 that your client is going to have a lot to do, everybody has
18 a lot to do, this is a schedule, and if in fact what's being
19 contemplated is to not even get out of the starting blocks
20 until November then we need to have an attitude adjustment,
21 because that's not -- again, I respect people's life's
22 events and religious holidays --

23 MS. WALSH: Right.

24 THE COURT: -- and schedules, but we're not going
25 to wait until November to get started, nor frankly should it

1 take, you know, ten days to agree on the discovery schedule.

2 MS. WALSH: Right, understood.

3 THE COURT: I mean the way I would -- you know,
4 you're counsel, you come up with a proposal, you're going to
5 have to go through it with her, it just doesn't take that
6 long.

7 MS. WALSH: Uh-huh.

8 THE COURT: She's not reviewing a substantive
9 draft, she's not -- it's not a settlement discussion, it's
10 just a schedule.

11 MS. WALSH: Right.

12 THE COURT: So we're going to have to move a
13 little more rapidly. I mean I think, you know -- and again,
14 you said that she's -- this person is coming back on the
15 14th.

16 MS. WALSH: Yes, she's back on the 14th.

17 THE COURT: Okay. The Jewish holidays commence on
18 the 14th, so I don't want to inadvertently --

19 MS. WALSH: Uh-huh.

20 THE COURT: -- be prejudicing anybody in that
21 regard. But that being said, I don't see a reason why by
22 the close of business on the 18th you can't have either
23 agreed or agree to disagree and then you can submit, you
24 know, competing proposals or counsel for Lehman can submit
25 its proposal and indicate what your issue is with respect to

1 any component of it.

2 MS. WALSH: Okay.

3 THE COURT: All right? So that's, you know,
4 giving your client time to, you know --

5 MS. WALSH: So the end -- that's the end of next
6 week.

7 THE COURT: That's the end of next week. So if
8 your client returns on the morning of the 14th that gives
9 you until the end of close of business on the 18th.

10 MS. WALSH: I appreciate that, and that'll give us
11 time to hopefully work this out and not have to be back
12 before you.

13 THE COURT: But again, waiting until November to
14 serve document --

15 MS. WALSH: Right.

16 THE COURT: -- requests is a non-starter.

17 MS. WALSH: Right. Well we had not gone over this
18 with the client, this was something, you know, based on
19 other discovery schedules in other cases, we looked at
20 those, and the schedule initially proposed by Lehman was
21 about half the time of other cases, and especially since,
22 you know, the Commonwealth has responded to subpoenas back
23 in 2010 and already produced --

24 THE COURT: Sure.

25 MS. WALSH: -- significant documents, you know,

1 that -- we just want to be very sensitive to not -- we don't
2 want to be rushing discovery. We would be at a severe
3 disadvantage since they've already gotten boxes of documents
4 from us if then we're moving very quickly and we don't have
5 the time to really, you know, go through everything and get
6 exactly what we need since we haven't had the benefit of
7 discovery. So that's not --

8 THE COURT: I don't think I'm following that. I
9 mean there's a certain lopsidedness in these cases. I mean
10 the issue is largely focused on the conduct of the
11 Commonwealth.

12 MS. WALSH: Uh-huh.

13 THE COURT: Right? So the fact that you have
14 already responded to a subpoena and presumably gathered and
15 produced documents --

16 MS. WALSH: Right.

17 THE COURT: -- that's a good thing in the sense of
18 that it's not work that needs to be duplicated --

19 MS. WALSH: Redone.

20 THE COURT: -- because you've already internally,
21 you know, done that.

22 MS. WALSH: Uh-huh. Uh-huh.

23 THE COURT: And as these things go I think it's
24 very hard to make apples to apples comparisons, because
25 everyone is different, some involve more transactions, some

1 involve fewer transactions, people keep records better or
2 not.

3 MS. WALSH: Right.

4 THE COURT: I'm not going to prejudice you, but my
5 general attitude, if you will, as we head into the fall of
6 2015 and are staring down the seventh anniversary of the
7 Lehman filing is I want to -- I'm going to really start
8 moving these things long as quickly as I can, because there
9 are a lot of them --

10 MS. WALSH: Uh-huh.

11 THE COURT: -- and they don't get better with
12 time.

13 MS. WALSH: Uh-huh.

14 THE COURT: So you can tell your client that, you
15 know, we're going to be energetic about this.

16 MS. WALSH: Okay.

17 THE COURT: But will not act in a way that causes
18 any undue hardship.

19 MS. WALSH: Thank you, Your Honor.

20 THE COURT: Does that sound all right?

21 MS. WALSH: Yes, the 18th is -- we'll work towards
22 that.

23 THE DEFENDANT: Does that sound all right to you
24 folks?

25 All right. So we'll wait to hear from you. First

1 choice is an agreed schedule and second choice will be
2 something other than that. All right?

3 MS. WALSH: Thank you.

4 THE COURT: Okay. Thank you very much. I think
5 that's it. That's it, Matt. Thank you.

6 (Whereupon these proceedings were concluded at 11:14
7 AM)

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C E R T I F I C A T I O N

I, Dawn South, certify that the foregoing transcript is a
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